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the TTAB

Paper No. 9
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Constant Velocity Transmission Lines, Inc.

Serial No. 78/062,354

Kristin C. Castle of Sierra Patent Group, Ltd. for Constant Velocity Transmission Lines, Inc.

Tonja M. Gaskins, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Bottorff, Rogers and Drost,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Constant Velocity Transmission Lines, Inc. has filed an application to register HARDWIRE on the Principal Register as a trademark for goods identified as "non-permanent, interchangeable electrical speaker cables and interconnect cables for connecting musical instruments to acoustic systems for musical recording and playback." Applicant asserts that it has a bona fide intention to use the mark in commerce on or in connection with the

identified goods. The examining attorney, however, has refused registration under Section 2(e)(1) of the Lanham Act, on the ground that the designation is merely descriptive of the identified goods.

When the refusal of registration was made final, applicant filed this appeal. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing.

With its appeal brief, applicant filed declarations made by, respectively, the sole proprietor and general counsel of applicant. The examining attorney, in her brief, objected to the declarations as untimely because they were not submitted prior to filing of the appeal or with a request for remand of the appeal. Trademark Rule 2.142(d) provides that the record in an application should be complete prior to appeal and that the Board will ordinarily not consider late-filed evidence. We have not considered the declarations offered by applicant.

The question whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used, or will be used, on or in connection with those goods or services and the possible significance that the term would have to the average

purchaser or user of the goods or services. See In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979); and In re Recovery, 196 USPQ 830, 831 (TTAB 1977).

A proposed mark is considered merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Lanham Act, if it immediately describes an ingredient, quality, characteristic or feature thereof, or if it directly conveys information regarding the nature, function, purpose or use of the goods or services. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-218 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods or services in order for it to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. In re Venture Lending Associates, 226 USPQ 285 (TTAB 1985).

The examining attorney bears the burden of establishing a prima facie case in support of a descriptiveness refusal. See In re Gyulay, *supra*. The examining attorney is not required to prove that the public would actually view a proposed mark as descriptive, but must at least establish a reasonable predicate for the refusal, based on substantial evidence, i.e., more than a

scintilla of evidence. In re Pacer Technology, __ F.3d __, 67 USPQ2d 1629 (Fed. Cir. 2003).

The examining attorney relies on the following dictionary definitions:

hard-wire 1. To connect (electronic components, for example) by electrical wires or cables. 2. To implement (a capability) through logic circuitry that is permanently connected within a computer and therefore not subject to change by programming. 3. To determine or put into effect by physiological or neurological mechanisms; make automatic or innate: "It may be that certain orders of anxiety are hard-wired in us" (Armand Schwerner, *American Poetry Review* September/October 1995).
The American Heritage Dictionary of the English Language (4th ed. 2000).¹

hardwired 1. In software, a function or capability that is hardcoded (programmed) into a system. Generally, anything that cannot be modified or customized. 2. In hardware, a connection that does not have a plug; it is directly connected, usually soldered to a board, switch or power supply.
Computer, Telephony and Electronics Glossary and Dictionary
([wysiwyg://14/http://www.csgnetwork.com/glossaryh.html](http://www.csgnetwork.com/glossaryh.html)).

These definitions are all that is in the record, since neither applicant nor the examining attorney put anything further into the record during examination and given that we have excluded the two untimely declarations offered by

¹ The examining attorney actually introduced what she termed as "dictionary definitions taken from various on-line web sites." The first two, however, although from different web sites (www.dictionary.com and www.bartleby.com), both recite the same

applicant with its appeal brief. The examining attorney argues that these definitions support a conclusion that applicant's mark is descriptive because the goods "are used to connect items by *electrical* wires or *cables*" (emphasis by examining attorney). Applicant, in contrast, argues that, as an industry term, "hardwire" means permanently connected wiring and notes that its goods are non-permanent, interchangeable cables.

The examining attorney argues in her brief that there is nothing in the record to support applicant's argument that "hardwire" refers to a permanent connection. We disagree. The second definition put into the record by the examining attorney refers to a hardwired item (other than a software item) as "a connection that does not have a plug; it is directly connected, usually soldered."

The examining attorney essentially is relying on the first meaning of the American Heritage Dictionary as indicating that any item connected to something else or to a source of electrical power, e.g., an outlet, by a wire or cable should be considered as hardwired; and is asserting that because applicant's goods will connect "musical instruments" and "acoustic systems for musical recording

American Heritage Dictionary definition. Thus, we have cited the common source for the two sites.

and playback," applicant's product is that which allows these items to become "hardwired." Under this theory, the examining attorney is essentially arguing that HARDWIRE is a noun when used on or in connection with applicant's product, i.e., it is the "hardwire" itself.

We find the examining attorney's reasoning a bit too strained. The dictionary definitions of record appear to refer to "hardwire" as a verb and "hardwired" as an adjective. We do not read any of the proffered definitions as those of a noun. Even if we accept the proposition that there is such an item as a "hardwire," we find on this record that such an item would be a product that permanently connects electronic components, not something as mundane as an extension cord or, for example, a cable that connects a computer to a monitor or printer.

Moreover, hardwiring appears to be a term of art primarily in the computer or electronics fields, not in the music field. Thus, while it appears likely that the term would be readily recognizable if the prospective customers for applicant's product were from the electronics or computer fields, musicians would be less likely to grasp the significance.²

² The examining attorney did not make any inquiries about the precise nature of applicant's product, or the class of

When there is doubt about whether a term is descriptive or suggestive when used on or in connection with an identified product, doubt must be resolved in favor of the applicant and publication of the designation for potential opposition. See In re Gourmet Bakers, Inc., 173 USPQ 565 (TTAB 1972). See also, In re Bel Paese Sales Co., 1 USPQ2d 1233 (TTAB 1986). In this case, we have doubt about whether HARDWIRE would be viewed as immediately descriptive or merely suggestive when used on or in connection with a product used to temporarily connect a musical instrument to an acoustic recording and playback system. Accordingly, we resolve such doubt in favor of applicant.

Decision: The refusal of registration under Section 2(e)(1) of the Lanham Act is reversed.

prospective consumers or users. Thus, we are unable to do anything other than note that the identified product appears to be a music industry item rather than a computer or electronic industry item.